IN THE

Supreme Court of the United States

No. 508 October Term 1963

ANDRES LUCAS and ARCHIE L. LISCO, individually and as citizens of the State of Colorado, taxpayers and electors therein, for themselves and for all other persons similarly situated,

Appellants,

vs.

THE FORTY-FOURTH GENERAL ASSEMBLY OF THE STATE OF COLORADO, JOHN LOVE, AS GOVERNOR OF THE STATE OF COLORADO, HOMER BEDFORD AS TREASURER OF THE STATE OF COLORADO, AND BYRON ANDERSON AS SECRETARY OF STATE OF THE STATE OF COLORADO, EDWIN C. JOHNSON, JOHN C. VIVIAN, JOSEPH E. LITTLE, WARWICK DOWNING and WILBUR M. ALTER,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

BRIEF OF APPELLEES

Edwin C. Johnson, John C. Vivian, Joseph F. Little, Warwick Downing and Wilbur M. Alter

---

RICHARD S. KITCHEN, SR.
First National Bank Building
Denver, Colorado

CHARLES S. VIGIL
E & C Building
Denver, Colorado

STEPHEN H. HART
JAMES LAWRENCE WHITE
WILLIAM E. MURANE
WILLIAM J. CARNEY, JR.

500 Equitable Building
Denver, Colorado

Attorneys for Appellees,
Intervenors Below

Ray F. Frey Co., Denver, Colo.

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Warwick Downing and Wilbur M. Alter

JURISDICTION

This is an appeal from a three judge district court. Jurisdiction is based upon 28 U.S.C. §1253.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. *Federal Constitution.* Constitution of the United

States, Amendment XIV, Section 1, provides in material part:

> ". . . nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

2. *Colorado Constitution.* Article V, Sections 45, 46 and 47 of the Constitution of the State of Colorado, as amended in the 1962 general elections by Initiated Amendment Number 7, the text of which is set forth in the Appellees' Appendix at page 257.[1] Amendment 7 refers to Section 61-1-3 Colorado Revised Statutes 1953, the text of which is contained in Appendix A to Appellants' brief. Along with Article V, Sections 45, 46 and 47, consideration must be given to Article V, Section 1, of the Colorado Constitution (the initiative) which is set forth in the Colorado Constitutional Provisions Appendix at the end of this brief.

3. *Colorado Statutes.* Although the validity of House Bill 65, Forty-Fourth Colorado General Assembly, 1963 (sometimes referred to below as the "Lamb Bill", which implements Amendment 7) was expressly excluded from consideration by the court below (App. pp. 1-6), the bill may here become involved in the briefs or argument. Certain statistical information derived therefrom is set forth as Appendix B to Appellants' brief. This Court by order dated January 6, 1964 requested the inclusion of such information in the briefs submitted.

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[1]This Court by order dated January 6, 1964 dispensed with the printing of the record. The Clerk advised that counsel might print any parts of the record which they desired to bring to the attention of the Court as an Appendix to their briefs. Counsel for all of the Appellees have caused to be printed in a separate Appendix substantially all of the testimony given and the exhibits introduced in the court below. Page references in this separate Appendix will hereafter be referred to as "App. p. .....". In addition, the Clerk has permitted all of the Appellees to file as a separate document a report prepared by the Denver Research Institute, University of Denver, which was Defendants' Exhibit D in the court below and will here also be referred to as "Defendants' Exhibit D".

QUESTIONS PRESENTED

1. Where:

(a) the lower house of Colorado's bicameral state legislature is composed of members from districts apportioned on a strict population basis;

(b) the apportionment of seats in its senate is provided on a basis of districts, reasonably homogeneous within themselves and distinct from others and based upon considerations of that state's population and its geographical, economic, sociological and governmental characteristics (including comprehensive home rule provisions for urban residents); and

(c) the availability of initiative if necessary for statutory enactment assures majority rule on a per capita basis;

whether such apportionment of the senate is so arbitrary and capricious as to violate the Equal Protection Clause of the Fourteenth Amendment simply because it does not also result in numerical equality.

2. Where:

(a) the Colorado method of apportionment under attack results from a state constitutional amendment initiated by the people and adopted at the general election in 1962, wherein the vote of each voter was given equal weight;

(b) such apportionment prescribed by the people carried not only in the state as a whole but in every county thereof—urban as well as rural; and

(c) at the same election the electorate of the state as a whole and in every county thereof rejected another initiated amendment which would have apportioned both houses on a strict census basis;

whether such constitutional apportionment so adopted by the people should be nullified by this Court.

3. Whether this case should not be dismissed because there exists a plain and adequate remedy through the use of readily available, inexpensive and frequently invoked initiative provisions of the Colorado Constitution for the electorate (by a simple statewide majority vote) to further amend the apportionment of the state"s legislature at any time they so desire.

STATEMENT

A. *The Parties.*

Plaintiffs below are Appellants here and brought an action attacking the apportionment of the Colorado bicameral legislature. Appellant Andres Lucas is a Colorado citizen, a resident of Westminster (a home-rule city in Adams County), a qualified voter, taxpayer and former member of the Colorado House of Representatives (Democrat). Appellant Archie L. Lisco is a Colorado citizen, a taxpayer, a resident of the City & County of Denver and a qualified voter.

Defendants below and Appellees here are the Colorado legislature and the Colorado Governor, Treasurer and Secretary of State.

Intervenors below and additional Appellees here, on whose behalf this brief is filed, were the proponents and initiators of Amendment 7, passed by the Colorado electorate in 1962, which apportions the Colorado legislature and which is here sometimes called the "Colorado plan." The Intervenors are: Edwin C. Johnson, three times Governor of Colorado, three times United States Senator, one time Lieutenant Governor and four times member of the Colorado General Assembly (Democrat); John C. Vivian, former Governor and Lieutenant Governor of Colorado (Republican); Joseph F. Little, lawyer and former Democratic

state chairman of Colorado and former Democratic Co-Chairman of Denver County (Democrat); Warwick Downing, attorney (Democrat); Wilbur M. Alter, former Chief Justice of the Supreme Court of Colorado (Republican). Intervenors Johnson, Vivian and Alter were members of the commission appointed by the Colorado Governor, Stephen L. R. McNichols (Democrat), in 1957 to study reapportionment of the Colorado legislature.

B. *The case below.*

Complaint was filed in the Federal District Court for Colorado in Action No. 7501 on March 28, 1962. A motion to dismiss was filed by the Colorado Attorney General, but no action was taken in that case because there was then pending an original proceeding before the Colorado Supreme Court wherein Appellants were also attacking the then current apportionment. *In the Matter of Legislative Apportionment*, 374 P. 2d 66 (July 6, 1962). When the Colorado Supreme Court declined to act, case No. 7637 was filed in the Federal District Court for Colorado three days later, on July 9, 1962.

The Plaintiffs in said cases, two of whom are Appellants herein, alleged that the then existing apportionment of the Colorado Legislature under the Constitution and statutes in effect at that time violated the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States. The sections of the Colorado Constitution then involved are set forth in Appellants' brief. (*Br.* p. 6) The Colorado statutes involved when the complaints were filed were Colorado Revised Statutes 1953, 63-1-1 to 63-1-8, also set forth by Appellants. (*Br.* pp. 67-74) The officials of the State of Colorado, by the Attorney General, filed motions and answers denying the jurisdiction of the lower court and the allegations of the complaints, except population figures as shown by the 1960 United States official census.

Added Appellees Edwin C. Johnson, John C. Vivian, Joseph F. Little, Warwick Downing and Wilbur M. Alter were allowed to intervene, and in their petition set forth the pending initiated amendments 7 and 8 for reapportionment of the Colorado Legislature. (App. p. 257 and p. 259)

Less than one month after the second complaint was filed, and on July 30, 1962, a one day hearing was held. The sole witnesses produced were those of Intervenors, added Appellees herein; a full transcript thereof is set forth in App. pp. 7-46. No additional evidence was introduced other than official census figures and statistical data based thereon.

Thereafter on August 10, 1962, a Memorandum Opinion was filed, the lower court concluding essentially that a *prima facie* case of invalidity of the former statutes had been established but withholding further orders pending action of the people on amendments 7 and 8 in the election to follow in November of the same year. *Lisco v. McNichols*, 208 F. Supp. 471.

At the November 1962 general election the electorate of the State of Colorado overwhelmingly and in every county adopted Amendment 7 and rejected Amendment 8. (App. p. 229, Intervenor's Exhibit C) The lower court then allowed Appellants to amend their complaints for the purpose of attacking the validity of the Constitution as amended. With relation to the presentation in the court below, the trial court said:

> "The cases now before the court do not present the issues as they existed prior to the apportionment made by Amendment No. 7. As noted by our opinion in Lisco v. McNichols, 208 Fed. Supp. 471, 477, the then-existing disparities in each chamber were severe, the defendants presented no evidence to sustain the rationality of the apportionment, and witnesses for the intervenors, while defending the apportionment of the senate, recognized the malapportionment of the

house. The change by Amendment No. 7 was such as to require a trial de novo and we are concerned with the facts as finally presented." (App. p. 245)

At the trial *de novo* appellants again presented no evidence other than statistics. Appellees, however, submitted comprehensive details as to the physical and political facts in Colorado, the historical background and rationale of apportionment under Amendment 7. The evidence of appellee's included testimony of eminent qualified persons:

JOSEPH F. LITTLE, Esq. former Democratic Co-Chairman of the City and County of Denver and former Democratic Colorado State Chairman;

HON. EDWIN C. JOHNSON, three times Governor and three times United States Senator of Colorado, without question the most experienced living Colorado political figure;

DR. JAMES GRAFTON ROGERS, among other positions former Dean of the law schools of the University of Denver and the University of Colorado, former Professor of Law and Master of Timothy Dwight College at Yale University, former Assistant Secretary of State of the United States, former Mayor of Georgetown, Colorado, presently Chairman of the Board of Directors of the State Historical Society of Colorado, author of many publications on law, public affairs and history, without question one of Colorado's most distinguished living citizens in the field of education and public affairs.[2]

DR. JOHN P. LAWSON, Professor Emeritus of Political Science, University of Denver; and JOHN G. WELLES, Director of the Industrial Economics Division, and DEAN CODDINGTON, Research Economist, both of the Denver Research Institute, University of Denver. The testimony and evidence produced at the trial by appellees

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[2] App. p. 55, Who"s Who in America, 1962-1963, p. 2652.

is set forth in full (with deletion of one lengthy, irrelevant cross examination) in the appendix to appellees' briefs and in Defendants' Exhibit D filed herewith.

The Three-Judge Court below upheld the validity of the Colorado Constitution, *Lisco v. Love*, 219 F. Supp. 922, with one dissent. The majority opinion by Circuit Judge Breitenstein and presiding District Judge Arraj is set forth commencing at App. p. 235.

C. *Background of apportionment in Colorado.*

An examination of Colorado apportionment history reveals great activity from earliest territorial days to date. This history may be summarized as follows:

1. *Territorial Apportionment.*

While the Organic Act adopted by Congress for the Territory of Colorado (Act of Feb. 28, 1861, Ch. 59, 12 Stat. 172) called for apportionment of the territorial legislature on a population basis, the actual apportionment did not reflect this principle, contrary to Appellants' Statement (Br. p. 15). Actually there were three reapportionments during the sixteen years Colorado was a territory (Rogers, App. p. 61), none of which were on a strict population basis. For example, comparing Revised Statutes of Colorado, 1868, page 420, with the first official United States Census of 1870, we find that Summit County had one territorial Councilman (Senator) for 258 people, while the district composed of Boulder, Larimer and Weld Counties had one for a total of 4,413 people. The reason for the variation is no doubt expressed by the framers of the Constitution who said, ". . . every county will have a member in the House of Representatives, without regard to population. Such a provision in a state where many of its [26] counties *are larger than whole states further east is a necessity* . . ."[3] (emphasis added).

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[3]Proceedings of the Constitutional Convention, Smith-Brooks Press, p. 728 (1907).

2. *State Apportionment.*

(a) Contrary to the statement of Appellants (Br. p. 15), the record shows that neither house of the Colorado General Assembly has ever, before the adoption of the Colorado plan in 1962, been apportioned on a strict population basis. (Rogers, App. pp. 65-68) For example, a comparison of the senatorial districts established initially by the Constitution in 1876 (1935 Colo. Stat. Ann. Vol. 5; Constitution of Colorado Art. V, Sec. 48) with the 1870 census reveals that Park County was assigned one Senator for 447 people and Pueblo County one for 2,265 people. Just four years later, according to the 1880 census, the senate variation ranged from one Senator for 2,486 people in the Eleventh District to one Senator for 12,365 people in the Fifth District and one for 25,536 in the Thirteenth District.

(b) The Constitution of Colorado, Article V, Section 45, as it existed from 1876 until its amendment in 1962, provided for a state census and reapportionment following each state and federal census, setting forth that, "[t]he General Assembly shall . . . revise and adjust the apportionment for Senators and Representatives, on the basis of such enumeration *according to ratios to be fixed by law.*" (Emphasis added). The officials of Colorado uniformly, and correctly, interpreted the State Constitution only as a limitation on the otherwise plenary powers of the General Assembly. (Rogers, App. pp. 78-79; *City and County of Denver v. Sweet*, 138 Colo. 41, 329 P. 2d 441 (1959)) Therefore, so long as the population ratios required by the former Constitution were established and observed, the people and their representatives were free to consider factors other than population in drawing district lines and in the resulting apportionment, and they acted

accordingly. (Johnson, App. p. 32; Rogers, App. pp. 77-79.)

The ratios actually adopted varied from time to time and, because of the difference in size of the house and senate, were different in each house. Generally, the method was to assign one seat to "X" number of voters and an additional seat to the same district for some multiple of "X". (App. p. 66) The existing statute immediately prior to 1962, Section 63-1-2, Colo. Rev. Stat. 1953, established the ratios in the senate at one for the first 19,000 of population in a district and one for each additional 50,000 or fraction over 48,000. The ratio so provided for the house was one representative for the first 8,000 of population in a district and one for each additional 25,500 of population or fraction over 22,400.

(c) From its admission as a state in 1876 to date there have been eight *major* reapportionments in Colorado, as follows:

(1) By the General Assembly in 1881, 1891, 1901, 1909, 1913 and 1953. (App. pp. 61-63; defendants' E exhibits; App. p. 213 et seq.; Opinion, App. p. 249)

(2) By the people, by initiated measures in 1932 and 1962. (App. pp. 249-250)

(d) In 1950, the citizens of Colorado adopted a referred measure increasing the size of the Legislature to 100 members. (1935 Colo. Stat. Ann., Vol. 5, 1950 Supp.; Constitution Article V, Sec. 46; Session Laws of Colorado 1951, p. 553)

(e) In 1954, 1956 and 1962 major reapportionment proposals, the first a referred measure and the last two initiated, were considered and rejected by the people. (Opinion, App. pp. 249-250; App. pp. 198-

201) The 1954 proposal was similar to Amendment 7 in that it placed the house on a population basis, but it did not change the pre-existing apportionment in the senate, giving no recognition at all to population shifts, particularly in the suburbs, and maintaining a clear-cut rural predominance. The 1956 and 1962 (No. 8) initiated proposals rejected by the people were substantially identical in effect and sought to apportion both houses of the General Assembly on a strict population basis. Both lost overwhelmingly, the first carrying only one county (Denver) in 1956, and the latter, Amendment No. 8 being defeated in all counties in 1962. (App. pp. 199, 201)

(f) During the period from 1956 to the date of the adoption of Amendment 7 and rejection of Amendment 8 in 1962, the Colorado General Assembly also was deeply engaged in continuing studies of apportionment.[4] In 1957, the then Governor of Colorado, Hon. Stephen L. R. McNichols, appointed a Governor's Commission to study Colorado's apportionment problems. The Chairman of this Commission was Hon. Wilbur M. Alter, former Chief Justice of the Colorado Supreme Court, one of the Intervenors and Appellees herein, and the Chairman of the Executive Committee of that group was Hon. Edwin C. Johnson, also an intervenor and appellee herein. The report of the Governor's Commission, presented as a majority and minority report, formed the basis for Amendment No. 7 and Amendment No. 8, respectively. (App. pp. 199-201)

D. *The Colorado plan of apportionment under Amendment 7.*

As correctly stated by the Court below (App. p. 239), the 1962 amendment to the Colorado Constitution "... created a General Assembly composed of a Senate of 39 mem-

[4] **Reapportionment of the Colorado General Assembly**, Colorado Legislative Council, Research Publication No. 52, December, 1961.

bers and a House of Representativs of 65 members. The state is divided into 65 representative districts 'which shall be as nearly equal in population as may be' with one representative to be elected from each district. The state is also divided into 39 senatorial districts, 14 of which include more than one county. In counties apportioned more than one senator, senatorial districts are provided which 'shall be as nearly equal in population as may be.' Mandatory provisions require the revision of representative districts and of senatorial districts within counties apportioned more than one senator after each Federal Census."

As the record shows, the rationale of the Colorado plan of apportionment was based on the following three major circumstances:

1. The first and most important circumstance is the variety of particular legislative interests of the State of Colorado arising from its topography and geography, its location, its history, its economy and the activities of its people. (App. pp. 94, 96, 103, 208)

2. The second of these is the existence of Article V, Section 1 of the Colorado Constitution, adopted in 1910, providing for both initiative and referendum as to both laws and amendments to the Constitution. (Colorado Constitutional Provisions Appendix)

3. The third circumstance considered is the widespread existence in Colorado of a comprehensive system of municipal home rule. By Article XX, Colorado Constitution, adopted in 1902 and 1912, the General Assembly has been stripped of legislative power as to matters of local and municipal concern to cities with a population of 2,000 or more which elect to become home rule cities. Colorado is among the four states in the Union following the most comprehensive doctrine as to the powers and "sovereignty" of home rule cities.[5] Over one-half of the population of

[5]Johnson, "Municipal Home-Rule in Colorado," 37 DICTA 240 (1960).

Colorado, located substantially in the metropolitan areas of the state, including the individual Appellants Lucas and Lisco, now reside in home rule cities. (App. p. 234, Intervenors' Exhibit E) It should also be noted that under Article XX, Section 1, Denver is not only a city, but also a county, and a single Congressional and School District, so that annexation by Denver affects an automatic change in other significant boundaries. (App. p. 204)

Returning to the first point above mentioned, the lower court, commencing at App. p. 245, sets forth some of the details of the situation as follows:[6]

> "In Colorado the problem of districting the state for the election of members of the legislature and of apportioning legislators to those districts requires consideration of the state's heterogeneous characteristics. The politically determined boundaries of Colorado created a state which is not an economically or geographically homogeneous unit. The topography of the state is probably the most significant contributor to the diversity.
>
> "Colorado has an area of 104,247 square miles which is almost equally divided between high plains in the east and rugged mountains in the west. It has an average altitude of 6800 feet above sea level and some 1500 peaks which rise to 10,000 feet or more. The Continental Divide crosses the state in a meandering line from north to south.
>
> "In the eastern half of the state are high plains crossed by two major river systems, the South Platte and the Arkansas. The western half is a mountainous area drained principally by the Rio Grande and by the Colorado River and its tributaries. Major mountain

[6]The factual data supporting these findings of fact by the Court are contained primarily in the Denver Research Institute report, Defendants' Exhibit D, submitted with this brief.

ranges lie east of the Continental Divide in some sections of the state and have foothill areas of varying breadth separating the high peaks from the high plains.

"Geographically the state is divided into many regions with transportation difficulties of varying severity. The high plains are crossed from east to west by several railroads and main highways. The only north to south rail system and main highway system in this area lie just east of the foothills. The western part of the state is separated into many segments by mountain ranges and deep canyons. One main-line railroad crosses this section from east to west and none from north to south. Four principal highways provide east to west transportation by crossing the ranges at passes having altitudes of 9,000 to 12,000 feet. The north to south highways are less adequate and follow indirect routes. The terrain of the western section is such that some communities only a few miles apart on the map are many miles apart by the shortest useable road. Commercial air transportation between other than the metropolitan centers is limited.

"Colorado is further divided by the availability of water supply. The state is largely semi-arid with only isolated mountain areas having an annual precipitation of over 20 inches. That part of Colorado west of the Continental Divide has 37% of the total state land area and 69% of the state's surface water yield. The part east of the Continental Divide has 63% of the land area and 31% of the surface water supplies.[7] Conflicts over the use of water have troubled the state continuously since its admission to the Union. The growth of the metropolitan areas would have been impossible without the transmountain diversion of water from the Colorado River and its tributaries. The divisive nature of the problem and the need for a

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[7]Colorado Year Book, 1959-1961, p. 451. (footnote 22 in the opinion below)

state-wide water policy resulted in the creation of the Colorado Water Conservation Board,[8] the members of which are chosen geographically by drainage basins. This recognition of the diverse interests of the competing areas has enabled Colorado to develop impressive irrigation and hydroelectric power projects.[9]

"The 1960 Federal Census gave Colorado a population of 1,753,947 persons. The population is concentrated heavily along the eastern edge of the foothills from Fort Collins on the north to Pueblo on the south. In this relatively narrow strip are located three Standard Metropoltan Statistical Areas as defined by the Census Bureau.[10]

"The metropolitan areas and their populations are: Denver (Adams, Arapahoe, Boulder, Denver and Jefferson Counties)—929,383; Colorado Springs (El Paso County)—143,742; Pueblo (Pueblo County)—118,707.

"Expert research economists testifying for the defendants divided the state into four regions, Western, Eastern, South Central and East Slope. The Western Region includes those counties west of the Continental Divide and those east of the Divide and entirely within the Front Range of mountains. The area is

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[8]Colo. Rev. Stat. Ann., 1953 §§ 148-1-1 to 148-1-19. (footnote 23 in the opinion below)

[9]Colorado Year Book, supra, pp. 459-462. (footnote 24 in the opinion below)

[10]So far as pertinent the Census Bureau defines a Standard Metropolitan Statistical Area as: "a county or group of contiguous counties which contains at least one city of 50,000 inhabitants or more or 'twin cities' with a combined population of at least 50,000. In addition to the county, or counties, containing such a city or cities, contiguous counties are included in an SMSA if, according to certain criteria, they are essentially metropolitan in character and are socially and economically integrated with the central city. The criteria followed in the delineation of SMSA's relate to a city, or cities, of sufficient population size to constitute the central city and to the economic and social relationships with contiguous counties that are metropolitan in character." (footnote 25 in the opinion below)

largely mountainous with wide fluctuations in elevation, precipitation and temperature. About two-thirds of the population live in communities of less than 2,500 inhabitants or on farms. Over 65% of the area is in some form of government ownership. The major industries are agriculture (principally livestock raising), mining, and tourism.

"The Eastern Region is a part of the Great Plains. The area is dominated by agriculture with winter wheat the principal crop. Irrigation in the South Platte and Arkansas Valleys produces specialized crops. Livestock raising and feeding are important activities. There is some oil production.

"The South Central Region includes Huerfano and Las Animas Counties and the six counties drained by the Rio Grande. Agriculture (principally potato raising and livestock) and coal mining are the main industries.

"The East Slope Region includes the strip of counties from Larimer and Weld on the north through Pueblo on the south. The population is highly urbanized with 86.7% living in urban areas. The economy is diversified with manufacturing, agricultural production, mining, tourism, and trade and services contributing to the wealth of the area.

"The state is divided into 63 counties, the boundaries of which have remained substantially unchanged since 1913. Historically, contiguous counties have been grouped into representation districts in accordance with a general pattern which is distinguishable since the early days of statehood. Geographical divisions such as mountain ranges and river basins, accessibility, homogeneity, and population all have been recognized. The apportionment of membership to the districts has varied with shifts in population. In the early days of

statehood the mining counties were heavily populated. After the turn of the century the increased population of the agricultural counties in the high plains and the decline of the mining counties required changes in apportionment. In more recent years the growth of metropolitan areas has caused a demand for greater representation of the urban centers in the legislature."

Presented with this Brief and that of the Attorney General of Colorado, in addition to the Appendix, is Defendants' Exhibit D, prepared by disinterested experts, at the University of Denver, which shows in further detail the nature of the multitude of districting problems existing in Colorado.

We particularly invite the Court's attention to the colored topographic map on the inside back cover of Defendants' Exhibit D with senatorial district boundaries shown thereon in heavy lines. The Court's attention is also invited to Part II, pages 51 through 62, of this Defendants' Exhibit D. It demonstrates that the senatorial districts in Colorado are formed by grouping counties along the lines of major river valleys and systems of communication and travel. Further, it is apparent that many of the periphery counties of the state have more in common with portions of neighboring states than with the rest of Colorado.

For example, the witness Little testified as follows:

"For instance, let's take Jackson County. There are times in the year when Jackson County, the only way to get in, is to go to Fort Collins, up to Larimie, Wyoming and back to Walden, because Cameron Pass is closed and that's it. It's a part of Colorado. It has got to be fitted into some political pattern." (App. p. 175)

The attention of the Court is also invited to Inter-

venor's Exhibit B (App. p. 227) illustrating the land masses involved in Colorado's senate districts. The average size, per Senator, of all districts in Colorado is 2,673 square miles in area; in "metropolitan areas" the average district size per Senator is only 413 square miles; and the average district size per Senator outside the "metropolitan area" is 5,052 square miles (an average area ratio of 12 to 1). As stated by the lower court (App. p. 252):

> "The realities of topographic conditions with their resulting effect on population may not be ignored. For an example, if the contention of the plaintiffs was to be accepted, Colorado would have one Senator for approximately every 45,000 persons. Two contiguous Western Region senatorial districts, Nos. 29 and 37, have a combined population of 51,675 persons inhabiting an area of 20,514 square miles.[11]

Appellants contend (Br. p. 40), that there is no historical basis for apportionment in Colorado other than population, while stating, on the other hand, that the Constitution has been "regularly ignored by the rural dominated Assembly." (Br. p. 42) As above indicated, the facts are entirely the reverse. The record shows that, prior to Amendment 7, factors other than population were predominant as to both houses of the Colorado General Assembly. Amendment 7 is a new departure—to a strict population basis in the house, with, as the lower court found, population as the "prime, but not controlling, factor . . ." in the senate. (App. p. 253) Stated another way, the witness Rogers testified that the purpose of the Colorado plan was not ". . . the prevention of the majority of the population controlling . . .", but rather that it had ". . . almost an opposite purpose." (App. p. 82)

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[11]Each of nine states, Rhode Island, Delaware, Connecticut, Hawaii, New Jersey, Massachusetts, New Hampshire, Vermont and Maryland contains less area. (footnote 33 in the opinion below)

SUMMARY OF ARGUMENT

The Colorado plan provides a method of apportionment which is in contrast to that obtaining in the other five cases involving state legislative apportionment now before this Court. This contrast stems mainly from the fact that the Colorado voters through the readily available method of initiative cannot be frustrated in their will for apportionment, now or later. In fact, the Colorado plan was initiated and adopted in 1962 by the Colorado voters. The electorate prescribed an apportionment of the lower house of the Colorado legislature on a strict basis of population and its senate upon considerations not only of population but also upon true representation through homogeneous districts which have separate interests one from the other. The choice to the voters was clear since they had also presented to them, also by the initiative, another plan (Amendment No. 8) in which both houses of its legislature would have been apportioned on a strict population basis. The Colorado plan adopted, received an overwhelming vote in its favor, not only in the state as a whole, but in every county thereof. The strict population plan for both houses was rejected in the state as a whole and in every county thereof.

With this perspective in mind, the argument in this brief is twofold. First, the Colorado plan satisfies the requirements of equal protection of the law inasmuch as the lower house is apportioned strictly on population and there is a rational basis for the qualified departure from strict numerical equality in the apportionment of the Colorado Senate. Second, ultimate legislative power in the state resides in the people, and the ready availability of the frequently exercised right of initiative provides a remedy for the people of Colorado so that it is neither necessary, nor desirable, for this Court to enter the delicate areas of the form of state government and politics in the exercise of its discretionary equitable powers.

I

In a legislative apportionment case, the constitutional concept of equal protection does not require numerical equality in both houses of a bicameral legislature where there is a strict population apportionment in the lower house and where there is a rational basis for departure from such strict population basis in the senate. Under the Colorado plan the deviation from mere numbers in the apportionment of the senate leads to meaningful apportionment and results from recognition of diverse areas of concern within the state.

The Colorado Senate presents the only issue. The senate has been apportioned by the people of Colorado through initiative when in 1962 they adopted the Colorado plan and at the same time rejected a strict population basis for the senate. This action of the electorate is not irrevocable since they can at any biennial election again apportion either house of the legislature as they see fit. The Colorado plan recognizes population as the only basis for apportionment of the lower house and as a prime, but not controlling factor, in the apportionment of the senate. In addition to population, the senate apportionment gives effect to the important considerations of geography, compactness and contiguity of territory, accessibility, observance of natural boundaries, conformity to county entities as political building blocks and "a proper diffusion of political initiative as between a state's thinly populated counties and those having concentrated masses." (App. p. 253)

That population was given due consideration is evident from the fact that the less populated rural areas do not dominate the urban or metropolitan areas of the state because no possible combination of Colorado senators from rural districts can result in a senate majority.

In evaluating this important matter of urban interests against rural interests, there must also be considered the fact that more than half of Colorado's total population

resides in cities having "home rule" wherein there is no dependence upon the state legislature for action in areas of local concern to each such community.

The reasonableness of the Colorado plan arises from all of the composite factors set forth. The facts are not in dispute and their cumulation bespeaks the rationality of the departure from equality based on unmeaningful numbers.

II

Plaintiffs below invoked the equitable jurisdiction of the court. While it must be recognized that this Court has held that a case involving a question on the apportionment of a state legislature presents a justiciable controversy, nevertheless the grant of relief lies in the sound discretion of the court. This discretion is particularly called for when there is a request for judicial intervention in state legislative apportionment. In such a case the equitable powers are to be exercised only under compelling circumstances. In the case of the constitutional provisions obtaining in Colorado, no such compelling circumstances exist.

It is the readily available, inexpensive and frequently exercised process of initiative which in the instant case constitutes the main circumstance militating against judicial intervention. Initiative has a twofold impact in this case. First, the Colorado plan, as to which equitable intervention is requested by the Appellants, was the result of recent overwhelming popular support for that plan in both rural and urban areas and the contemporaneous rejection of a plan based on numerical equality for both houses. Second, and perhaps even more importantly, the initiative by the people themselves is an adequate, efficacious and preferable remedy to correct any malapportionments which may result from shifts in population or for any other reason. Its availability[12] prevents the frustration of the popular will

[12]In the last fifty years, there have been sixty-two propositions of constitutional amendment submitted to Colorado voters through the initiative.

and puts in the hands of the people, on a state-wide majority vote basis, the means of permitting orderly state political evolution. In either instance, either in judging the Colorado plan as a fact resulting from initiative or in considering initiative as a remedy for the future, that initiative renders it unnecessary for this Court or any court in the federal system to intrude into the delicate areas of the form of state government and the expression of political will.

ARGUMENT

I. PERSPECTIVE OF THE CASE

In *Baker v. Carr*, 369 U.S. 186 (1962) the Court first took jurisdiction in a case involving state legislative reapportionment. The merits of Tennessee's apportionment were not reached, although it was held that there was a justiciable cause of action. The Tennessee apportionment, according to the pleadings, involved flagrant examples of invidious discrimination against certain voters. It was a "crazy quilt" apportionment without a "rational design." (369 U.S. at 258) Moreover, the people of Tennessee were frustrated at all turns in their efforts to have the apportionment changed, because of the lack of initiative provisions and of inaction by the state legislature and courts. In short, when the people of Tennessee came to this Court they were "at the end of the line."

Since *Baker v. Carr* and at this term, the Court has heard argument in five other legislative reapportionment cases.[13] These cases have involved a variety of apportionments and it may be that this Court will find some within and some without the requirements of the Equal Protection Clause of the Fourteenth Amendment. This is not a matter for us to argue here. We would be remiss, however, not to call to the attention of the Court the uniqueness of the Colorado plan and its total dissimilarity with these other

[13]Maryland, No. 29; Delaware, No. 307; Virginia, No. 69; New York, No. 20; and Alabama, Nos. 23, 27, 41.

five cases. This Court will, in the six cases argued this term, be setting forth the fundamental guidelines and standards of legislative reapportionment. The starting point of consideration was *Baker v. Carr*. We will show that, regardless of the disposition of the other five reapportionment cases, the end point and the point short of which the line should be drawn, beyond which judicial intervention is not required, is certainly the Colorado plan. Colorado is a Rocky Mountain state which has its own unique problems. It has solutions to those problems which are without parallel in the other cases heretofore argued, and Colorado's Constitution has vested its people with the right, power and ability to deal directly with any apportionment problems that may arise.

In greater detail at a later part of the brief we will analyze the Colorado plan of apportionment. Our immediate purpose here is to bring the Colorado plan into sharp relief with those involved in the reapportionment cases of Alabama, Maryland, Delaware, Virginia and New York. The distinctions are:

1. The Colorado plan had its genesis in the initiative of the people, was placed on the ballot by Colorado voters and was adopted by a majority of the voters in every Colorado county in the 1962 general election. None of the other five legislative apportionments was so adopted.

2. At the same 1962 general election and by a majority vote in every Colorado county the voters rejected a proposed initiated amendment to the constitution which would have apportioned both houses of the state legislature on a strict population basis. In none of the other reapportionment cases were the citizens of their respective states given this choice.

3. Under the Colorado plan, the lower house of the state's legislature is apportioned strictly on the basis of

population. None of the lower houses in the other five cases is so apportioned.

4. The record below will show that the Colorado Senate is apportioned on the basis of districts, reasonably homogenous within themselves and distinct from others, which were cast to give effect to Colorado's economic, geographic, sociological and governmental characteristics and which are additionally based upon factors of population. The maximum possible deviation from strict representation by population between any two Colorado senatorial districts is 3.6 to 1, but this ratio of divergence has no meaningful effect upon the practical operations and control of the state legislature. For example, the state's three metropolitan areas, Denver, Pueblo and Colorado Springs, elect a majority of the senate. With the exception of a slightly lower ratio between senatorial districts existing in New York, none of the other four states has a senate ratio as nearly equal as Colorado's.

5. This case has a factual record evidencing a reasonable and rational basis for the Colorado plan. From a reading of the briefs, it appears that none of the other five cases has a comparable record or discloses as rational a basis for apportionment.

6. Colorado has readily available, inexpensive and frequently exercised initiative procedures whereby the people by majority vote may adopt, as they did the present Colorado plan, any apportionment of the legislature they may choose. None of the other five states involved in legislative reapportionment cases before this Court give such initiative to their citizens.

7. Colorado's Constitution grants any city or town with a population over 2,000 the right to legislative sovereignty through home rule over all matters of local or municipal concern. Comparable home rule provisions exist in

none of the constitutions of the states of Alabama, Maryland,[14] Delaware, or Virginia.

The peculiar merits of this case should not become obfuscated by being commingled with the five cases previously argued. Colorado's plan should not be equated with these cases because its differences are material, substantial and cogent within the framework of the Equal Protection Clause. In any series of cases on the same problem, there must ultimately be a distinction between the right and the wrong, the permissible and the impermissible. We contend that unless the line is drawn in such a way as to validate the apportionment provisions of one or more of the other five reapportionment cases (in which case Colorado's plan is *a fortiori* valid) the line should be drawn here and the Colorado plan upheld.

II. THE EQUAL PROTECTION STANDARD IS ONE OF REASON, NOT NUMBERS.

To assert, as do Appellants, that Equal Protection is synonymous solely with numerical equality is to ignore the decisions of this Court to the contrary. See for example, the concurring opinion of Mr. Justice Douglas in *Baker v. Carr*, *supra*, wherein he states:

> "The traditional test under the Equal Protection Clause has been whether a State has made 'an invidious discrimination' . . . ." (369 U.S. at 244)

Although a specific determination of what constitutes such an invalid discrimination must relate to the factual setting of a given case, it is clear that mere numbers do not lead to meaningful determinations of what constitutes equal protection. As stated in *MacDougall v. Green*, 335 U.S. 281 (1948):

> "To assume that political power is a function exclusively of numbers is to disregard the practicalities of

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[14]Compare Maryland Constitution, Art. 11-E, §§ 3, 5 and 6.

government. Thus, the Constitution protects the interests of the smaller against the greater by giving in the Senate entirely unequal representation to populations. It would be strange indeed, and doctrinaire, for this Court, applying such broad constitutional concepts as due process and equal protection of the laws, to deny a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former. The Constitution—a practical instrument of government—makes no such demands on the States." (335 U.S. at 283-284)

See also *Walters v. City of St. Louis*, 347 U.S. 231 (1954), wherein the Court reaffirms that ". . . [e]qual protection does not require identity of treatment." (347 U.S. at 237)

Assuming then that numerical equality is not a constitutional requisite under the Equal Protection Clause, we turn briefly to the more positive standards which this Court has established. Basically they are that the deviation or discrimination against a particular class of citizens must have a "rational basis" (*Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 527 (1959)) and, in the factual context, be reasonable. As stated by Mr. Chief Justice Warren in discussing the Maryland Sunday closing laws:

> "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective . . . . A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify

it." *McGowan v. Maryland*, 366 U.S. 420, 425-426 (1961)

The principles of these cases are in point and the standards established apply here with full force. As noted by Mr. Justice Stewart in his concurring opinion in *Baker v. Carr, supra*, and after he cites *MacDougall v. Green, supra*, and *McGowan v. Maryland, supra*, "Today's decision does not turn its back on these settled precedents." (369 U.S. at 266)

In the next part of this brief we will show how the facts of this case, as they were developed in and found by the court below, demonstrate the rational and reasonable basis within the framework of the Equal Protection Clause for the challenged apportionment of the Colorado legislature.

III. THE METHOD OF APPORTIONING THE COLORADO LEGISLATURE IS REASONABLE AND RATIONAL.

A. The voters of Colorado through the initiative overwhelmingly adopted the present method of apportioning the Colorado legislature.

The factual Statement of this brief itself, without further argument, demonstrates that the Colorado electorate in every county of the state overwhelmingly adopted the Colorado plan now under attack and at the same time also overwhelmingly rejected a strict adherence to a numerical equality system for *both* houses of their legislature. The majority popular vote received in every county by the plan is unique in the history of Colorado politics. (App. p. 201) The vote was that of an informed electorate, fully educated as to the merits and provisions of the Colorado plan, which it adopted, and the rival plan, which it rejected. There was a well-organized campaign conducted by the proponents of each plan throughout the state. (App. p. 201) The interest engendered in the issue by this campaign is evidenced by the fact that more voters expressed their opinion by

voting on Amendment 7 than on any of the seven other issues on the ballot.[15]

This vote followed ten years of intensive study by the Colorado Legislature, the Report of the Governor's Advisory Commission and two votes of the people on apportionment proposals during this period. (App. pp. 198-200) Never before in Colorado history had so many voters been so well informed by the proponents of the two measures, and by the newspapers of the state. (App. p. 201)

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[15] **Abstract of Votes Cast, 1962 General Election**, compiled by Colorado Secretary of State and published by The Dingerton Press, Denver, Colorado (1962) pp. 28-29. This abstract shows that the three propositions receiving the heaviest vote were Amendment 7, Amendment 1, (relating to judicial reorganization) and Amendment 8, in that order. Colorado voters had eight proposed amendments to the State Constitution on the 1962 ballot. The table below is a brief summary of the subjects of these amendments, the total vote on each, and the result.

	Total Votes
Amendment No. 1—relating to judicial reorganization	472,792—Adopted
Amendment No. 2—relating to providing a separate civil service system for policemen and firemen in Denver	411,603—Rejected
Amendment No. 3—relating to basing Colorado Income Tax Returns on the Federal Form	433,579—Adopted
Amendment No. 4—relating to elimination of the one year residency requirement as a qualification for voters in presidential elections	441,265—Adopted
Amendment No. 5—relating to uniform assessment of taxable property	427,890—Adopted
Amendment No. 6—relating to the terms, election and payment of certain county and local officers	418,309—Rejected
Amendment No. 7—relating to reapportionment	478,425—Adopted
Amendment No. 8—relating to reapportionment	461,571—Rejected

To argue that Amendment 7 was "cleverly merchandised" (Appellants' Brief p. 59) to an uninformed electorate by a political group representing minority and insular interests[16] is to argue against the very basis of democracy. If the Colorado electorate was uninformed, misled and foolish in 1962, it is hard to see how any electorate could ever be said to be responsible and mature. Such an argument urges substitution of judicial judgment for that of the electorate, and totally ignores the guarantee of a republican form of government. Appellants claim to be asking this Court to allow the majority to govern itself, and yet they argue that this same majority was incapable of protecting its interests in 1962. If one starts from the assumption that the majority is capable of protecting its own interests, as Appellants must, then the only reasonable conclusion is that we must respect the majority's 1962 decision on apportionment.

We do not urge that a majority of voters may deprive a minority of constitutionally guaranteed rights or that a majority vote is a substitute for equal protection. Such would be the case if the majority had singled out a minority for discriminatory treatment or even if a minority had itself acquiesced in or agreed to being discriminated against. This case presents a fundamentally different situation. Here the majority of voters in every county of the State of Colorado, including the counties wherein Appellants reside and which they claim are discriminated against, has voted to impose restraints upon its own rule. Appellants in effect have alleged discrimination by the majority against itself. In point of fact, it should be regarded as a voluntary relaxing of the power of the majority over the

[16]Contrary to the opinion of the dissenting judge in the court below, espoused by Appellants here (Br. p. 59), Amendment 7 was not politically inspired. There is not even a scintilla of evidence to support this conclusion. On the contrary, both the testimony and the political background of the intervenors indicate the bipartisan support which the plan received. Intervenors Johnson, Downing and Little are members of the Democratic Party, while intervenors Alter and Vivian are Republicans.

minority, and this is by no means unreasonable. The interests of the Denver metropolitan area, for example, are interwoven in many ways with the recreational, mining and agricultural areas of the state and Denver's welfare depends in significant measure on the areas. (Rogers, App. p. 103) Further, these self-imposed restraints are by no means irrevocable, (as will be discussed below in part IV relating to Colorado's liberal initiative provisions) and if the majority should later feel that such limitations on strict majority rule are no longer desired it can modify or eliminate such limitations to whatever extent it desires. We know of no other case, pending or past, factually or analogously comparable to this case.

B. The apportionment of the Colorado Senate is based upon considerations of geography (including topography, transportation, accessibility and compactness of territory), water problems, regional communities of interest and distinguishing characteristics of the various districts.

The purpose of senatorial apportionment in Colorado is to create balanced and homogeneous districts, and within that framework to achieve a balance between and among them. The purpose is not to give one person's vote more weight than another's, but to recognize and create districts for which a representative is appropriate. For example, the Colorado plan does not apportion each county a senator even though counties are regarded as the building blocks of Colorado government (App. p. 208) Thus, even though county boundary lines are respected and counties are not split up to form senatorial districts, 14 of 39 senatorial districts are comprised or more than one county. In addition, each of the eight populous eastern slope counties apportioned more than one senator is subdistricted. (App. p. 257)

The history of Colorado reapportionments and of the present Colorado plan is one of attempts to give effect to the heterogeneous nature of the state and to keep pace with shifting populations. These attempts span the entire his-

tory of Colorado, the legislature having been apportioned or reapportioned twelve times, three times during the territorial period from 1861 to 1876 and nine times since Colorado became a state in 1876. (App. p. 61 and pp. 213-226) This is more than once every ten years. Two of the reapportionments, in 1932 and 1962, were by initiative of the people. (App. pp. 79 and 257)

The court below, as set out in greater detail in the Statement, *supra*, elaborates upon the rational bases for districting the state under the Colorado plan. The state is economically and geographically divisible into four basic areas, the mountainous Western region; the populous Eastern slope lying immediately east of the mountains; the chronically depressed South Central region; and, the Eastern region, a vast area of the Great Plains. Within these regions lie the various senatorial districts, each representing within its boundaries particular identifying characteristics. For example, a prime factor taken into consideration in forming these districts is the existence in Colorado of four major river drainage areas, those of the Arkansas, South Platte, Rio Grande and Colorado Rivers. (Defendants' Exhibit D, Part II, p. 52) These rivers rise in Colorado and flow into other states. They are the source of great benefit to the districts through which they flow, great problems in relation to the states other than Colorado into which they flow and serious competition among the areas themselves within Colorado because of diversion of water from one drainage area to another.[17]

Another identifying characteristic particularly significant in certain districts of the Western region is that

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[17] See: **City and County of Denver v. Northern Colorado Water Conservancy District**, 130 Colo. 375, 276 P.2d 992 (1954); **United States v. Northern Colorado Water Conservancy District**, et al., Civil No. 2782, pending D. Colo.; **Colorado River Water Conservation District** et al., petitioners, Civil Nos. 5016 and 5017, pending D. Colo.; **Nebraska v. Wyoming**, 325 U.S. 589 (1945); **Arizona v. California**, 298 U.S. 558 (1936); **Wyoming v. Colorado**, 298 U.S. 573 (1936); **Kansas v. Colorado**, 206 U.S. 46 (1907).

of accessibility. Colorado, in addition to being divided by the Continental Divide which bisects the state north and south, has its Western half sub-divided by a series of other mountain ranges and masses which contain some of the highest peaks in the United States.[18] These mountains tend to isolate the various western senatorial districts and to impede north-south transportation. Consider for example, the problem of access to his constituents a senator from District 19[19] in the southwest corner of the State would have if it were expanded to include Hinsdale County which, looking at a regular map,[20] would more logically appear to belong in such district instead of being a landlocked peninsula of District 11. Referring to the topographical map,[21] however, the illusory nature of Hinsdale's juxtaposition to District 19 becomes apparent. Hinsdale County and Lake City, its County Seat, are separated from District 19 by the San Juan mountains, as rugged as any in the United States outside of Alaska. It is literally impossible to travel from the district to this county seat, scant miles away, by automobile, train, or plane, without going around the mountains through two other districts to get there.

Finally, the immense land area of Colorado and, indeed, of some of the districts, is a factor to be taken into consideration. Senatorial District 13,[22] for example, encompasses 8,866,000 acres (13,853 square miles of land) and Senatorial District 18,[23] 6,524,160 acres (10,194 square miles of land). (App. pp. 227-228) Each of these districts

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[18] See the topographical map on the inside back cover of Defendants' Exhibit D.

[19] Montezuma, La Plata, San Juan and Archuleta Counties. See the map on the inside front cover of Defendants' Exhibit D.

[20] Ibid.

[21] Inside back cover, Defendants' Exhibit D.

[22] Moffat, Rio Blanco, Routt, Jackson and Grand Counties, Defendants' Exhibit D, Part I, p. 14.

[23] Elbert, Lincoln, Cheyenne, Kit Carson and Kiowa Counties, Defendants' Exhibit D, Part I, p. 31.

is larger than either Connecticut, Delaware, Hawaii, Maryland, Massachusetts, New Jersey, Rhode Island or Vermont. With such a vast land area served by relatively inadequate rural roads, they are problem enough for one state senator to traverse and represent.

Without going any further into a detailed analysis of the wholly uncontradicted evidence introduced at the trial below, substantially all of which is set forth in Appellees' separate Appendix hereto, it is sufficient here to note the following. Based on the factual data contained in the Economic Analysis of State Senatorial Districts in Colorado prepared by the wholly independent Denver Research Institute of the University of Denver (Defendants Exhibit D); upon the testimony of witnesses intimately connected with and versed in the historical, economic, political, social and geographical nature and character of Colorado (App. pp. 8-195) and upon the testimony of the drafters and proponents of the Colorado plan (App. pp. 197-211) there is substantial, rational and uncontradicted support for the facts found by the court below. After an extended discussion and analysis of the evidence (App. pp. 245-253) to which reference is here made without belaboring the matter and restating the same points, the court below concluded:

> "We are convinced that the apportionment of the Senate by Amendment No. 7 recognized population as a prime, but not controlling, factor and gives effect to such important considerations as geography, compactness and contiguity of territory, accessibility, observance of natural boundaries, conformity to historical divisions such as county lines and prior representation districts, and 'a proper diffusion of political initiative as between a state's thinly populated counties and those having concentrated masses'." (App. p. 253)

This is the Colorado plan, a plan drafted and adopted to reflect the characteristics and the problems of Colorado.

C. Population is one of the factors upon which the apportionment of the Colorado Senate is based.

The population of Colorado as reflected in the 1960 United States Census is 1,753,947. The Census designates the following three areas in the State as "Standard Metropolitan Areas": Denver, comprised of Adams, Arapahoe, Boulder, Denver and Jefferson Counties and having a population of 929,383; Colorado Springs, consisting of El Paso County and having a population of 143,742; and Pueblo, consisting of Pueblo County and having a population of 118,707. The combined population of these three urban areas is 1,191,832 or 67.95% of the total state population. (App. pp. 227-228) These areas, under the Colorado plan, will elect to the lower house of the Colorado legislature a percentage of representatives approximately equal to their percentage of the state population. These three metropolitan areas also will elect a majority, 20 out of 39, of the state's senators. (App. pp. 227-228) Thus, although mathematical equality is not arrived at in the election of senators, the populous eastern slope of the state, where all of the state's metropolitan areas are situated and where population growth has been most rapid, controls a majority of the seats in both houses of the legislature.

Consideration was also given in the Colorado plan to the balancing factors within the multi-county Denver metropolitan area. (App. pp. 179-180). For years there have been conflicts, primarily relating to annexations, between the City and County of Denver[24] and its suburbs in surrounding counties. (App. pp. 179-180) See *City and County of Denver v. Board of County Commissioners of Arapahoe County*, 376 P. 2d 981 (Colo. 1962) and *Board of County Commissioners of Jefferson County v. City and County of Denver*, 372 P. 2d 152 (Colo. 1962).) The balancing was achieved by increasing the number of sena-

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[24]The City and County of Denver is a municipal entity and its boundaries are coterminous.

tors for each suburban county (Adams, Arapahoe, Jefferson and Boulder), from one to two so that their combined representation of 8 senators for a population of 435,496 equaled that of the City and County of Denver, which is alloted 8 senators for a population of 493,887.

In making this argument we are not unmindful of Appellants' charge that all of the metropolitan areas are underrepresented in the Colorado Senate. On a strict count of numbers of persons per senator they are, but as noted above and as brought out in the testimony, they still control both houses of the Colorado legislature. Thus, although a theoretical minority of the voters representing 36% of the population can elect a majority (twenty) of the senators, the percentage has no real meaning in terms of the legislative process. It has become common to talk of minority dominance of state legislatures by rural elements. Yet, under the Colorado plan, no possible combination of Colorado senators from rural districts, assuming *arguendo* they would vote as a block, results in a senate majority. Indeed, the 36% figure referred to above requires the inclusion of two senatorial districts from the multidistricted Denver metropolitan area[25] as well as two other districts which include sizeable cities.[26] To seize upon this percentage figure of 36 is (1) to present a grossly misleading simplification of the legislative process and (2) to display complete naivete of that process. It can truly only be called a "numbers game."

If this were not enough to demonstrate how numbers do not always tell the full story, we call the Court's attention to the following. Appellants speak, regarding the Colorado Senate, of a "representational distortion in some cases approximating 4 to 1." (Appellants' brief, p. 3). The ratio referred to is that arrived at by dividing the census

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[25]Two from Boulder County, App. p. 227.

[26]Fort Collins (Larimer County) and part of Greeley (Weld County), App. p. 227.

population of the 4th Senate District (Las Animas County with a population of 19,983) into that of the 3rd district (El Paso County with a census population per senator of 71,871) and arriving at a ratio of 3.6 to 1. (App. p. 227) This approach ignores the significance in El Paso County of four major military installations (Ent Air Force Base, NORAD Headquarters, The Air Force Academy and Fort Carson) (App. p. 170) many of whose personnel are enumerated in the census[27] but are citizens of other states and vote outside of Colorado.[28] When the number of registered voters in Las Animas County (11,654) is compared with the registered voters per senator in El Paso County (28,251) the ratio drops to 2.4 (App. pp. 232-233). Indeed, wholly different ratios between the various districts may be arrived at by using the registered voter statistics rather than population, and neither set of statistics should be *ipso facto* controlling.

None of the above is advanced to suggest that ratios of 4 to 1 or of 2 to 1 or percentages of 36% or 51% are intrinsically good or bad, or reasonable or not insofar as the Colorado Senate is concerned. Rather, it is suggested that (1) numbers, percentages and ratios unrelated to other factors have little probative value; and (2) that before numbers are brought into play, an initial inquiry should be made into their source and whether it is meaningful. As is illustrated above, census figures alone do not tell the whole story.

As we also submit is illustrated above, the apportionment of the Colorado legislature and, specifically, the Colorado Senate, does not disregard the important factor of

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[27] "Persons in the Armed Forces quartered on military installations were enumerated as residents of the States, counties, and minor civil divisions in which their installations were located." (1960 United States Census of Population, Colorado, Number PC(1)(7A)p. v)

[28] These noncitizen residents not only vote in other states but as transients are to a great extent not affected by what transpires in the Colorado legislature or by Colorado's laws.

population. From the practical standpoint of state politics it leaves Colorado's three highly populated metropolitan areas in control of both houses of the legislature and, additionally, effects a balancing of interests and populations within the most populous of those areas, metropolitan Denver.

D. The Home Rule provisions of the Colorado Constitution accord to most Colorado cities a high degree of legislative autonomy over their own affairs.

Article XX, Section 6 of the Colorado Constitution vests any city or town with a population of 2,000 or more inhabitants with the power to "make, amend, add to or replace [its] charter . . . which shall be its organic law and extend to all its local and municipal matters": Section 6 provides that:

> "Such charter and the ordinances made pursuant thereto in such matters shall supersede within the territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith."

Section 6 then enumerates a large number of specific powers given the home rule cities and continues:

> "It is the intention of this article to grant and confirm to the people of all municipalities coming within its provisions the full right of self-government in both local and municipal matters and the enumeration herein of certain powers shall not be construed to deny such cities and towns, and to the people thereof, any right or power essential or proper to the full exercise of such right.
>
> "The statutes of the State of Colorado, so far as applicable, shall continue to apply to such cities and towns, except insofar as superseded by the charters of such cities and towns or by ordinance passed pursuant to such charters."

The effect of the home rule constitutional provision has been described in a recent case by the Colorado Supreme Court as follows:

> "By the Home Rule Amendment the General Assembly had been deprived of *all* the power it might otherwise have had to legislate concerning matters of local and municipal concern. Particularly is this true where a home rule city has adopted a charter or ordinances governing such matters." *Four-County Metropolitan Capital Improvement District v. Board of County Commissioners of Adams County*, 149 Colo. 284, 294, 369 P.2d 67, 72 (1962).

This power remains despite the fact that there may be questions from time to time as to what are "local and municipal matters." See: *Canon City v. Merris*, 137 Colo. 169, 323 P.2d 614 (1958).

At the present there are 26 home rule cities in Colorado with a total combined population of 976,888 or 56% of the state's total population.[29] Of these 976,888 people, 821,688 live in home rule cities located in the state's "metropolitan areas".[30] These "metropolitan areas" are comprised of the counties of Adams, Arapahoe, Boulder, Denver, El Paso, Jefferson and Pueblo[31] and are the identical areas alleged to be underrepresented in the legislature.

The net effect of home rule as to these cities and as to any cities which hereafter qualify and adopt home rule is to remove from the Colorado legislature a power to enact legislation as to local matters affecting them. This legislative power of home rule cities was another factor con-

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[29] Intervenor's Exhibit E, App. p. 234. Rifle, with a population of 2,135, was erroneously omitted from Exhibit E, 1963 (Directory of Municipal and County Officers in Colorado, published by the Colorado Municipal League, Boulder, Colorado.)

[30] Intervenor's Exhibit E, App. p. 234, erroneously fails to designate Westminster as being in a metropolitan area.

[31] 1960 Colo. Census, supra, p. 7-15.

sidered in the Colorado plan. (App. p. 204) If residents of home rule cities, having plenary power as to matters of their own local concern, and having no interest in matters of local concern elsewhere, were to be accorded overwhelming majorities in both houses of the legislature, the result would be arbitrary and irrational in the extreme. It would impose upon the people of the State of Colorado, residing outside of home rule cities, rule by a disinterested majority, contrary to familiar principles of fair play.

E. The composite factors behind the Colorado plan bespeak its reasonableness.

The reasonableness of the Colorado plan rests with all of the above factors.[32] The facts, as noted by the court below (App. p. 239), are not here in dispute. It is submitted that these cumulative facts bespeak of a reasoned and rational approach to the apportionment of the Colorado legislature within the framework of the Equal Protection Clause of the Fourteenth Amendment.

IV. THE APPORTIONMENT OF THE COLORADO LEGISLATURE DOES NOT PRESENT A SITUATION WHERE EQUITY NEED OR SHOULD INTERVENE.

A. The equitable power of this Court or of any Court in the federal system should not be exercised when no need for such exercise exists.

The equitable powers of this Court and the lower Federal Court have been invoked by Appellants. They seek both a declaration of the invalidity of the Colorado plan (Appellants' brief p. 65) and specific guidance from this Court as to a proper method of apportioning the Colorado

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[32] We have not, in view of the extensive treatment accorded it in the other five reapportionment cases, discussed the so-called "Federal analogy". We do submit, however, that regardless of the merits of the analogy *per se* and regardless of what factors lay behind the "Great Compromise" between the states, we cannot divorce consideration of what is fair and reasonable from the plan of apportioning Congress. The concept of bicameralism represented thereby and embodied in the Constitution, is ingrained in the American idea of what constitutes fair representative government. Colorado's close parallel to the apportionment of Congress reflects this idea.

legislature. (Appellants' brief p. 66) This request of Appellants presupposes that this case is a proper one for the Court to exercise its equitable powers. As will be shown, this is not such a case.

This case involves the balancing of law and politics, of the judicial and legislative branches of government, and of the Federal power and that of the states. It even balances the Federal judiciary against the voters of a state, in a situation where no discrimination against a minority is involved. Here, the role of the courts is as delicate as the balances to be maintained. This Court has historically approached problems in this area with necessary caution and, indeed, great reluctance.[33] We would not, therefore, be amiss to speak first of those principles which should in their application guide the action to be taken or remedies to be applied in this case.

We begin with the familiar principles that the exercise of the power of a court of equity is discretionary (*American Federation of Labor v. Watson*, 327 U.S. 582, 593 (1946)) and that where those who invoke the exercise of equity have other and more appropriate means of redress, they should be left to those means. *Matthews v. Rodgers*, 284 U.S. 521, 525-526 (1932)[34] In a reapportionment case the need for equitable intervention should be grounded on a showing of ". . . the most compelling circumstances . . ." requiring such intervention. *Colegrove v. Green*, 328 U.S. 549, 565 (1946) (concurring opinion of Rutledge, J. See also his concurring opinion in *MacDougall v. Green*, 335 U.S. 281, 284 (1948).)

This case presents no such compelling circumstances for, as will be shown in the following section, complete,

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[33]See: **Pennsylvania v. Williams**, 294 U.S. 176 (1935); **Luther v. Borden**, 7 How. 1 (1849).

[34]In taking this position we are not unmindful of the fact that under **Baker v. Carr, supra**, the matter here is justiciable. Our argument goes not to justiciability but to equitable discretion.

adequate, inexpensive and readily available relief is now and will be available to any dissidents through the initiative and referendum to correct any deficiencies in the Colorado apportionment which they find. The proper means of preserving the delicate balance of state vis-a-vis federal responsibility in this apportionment area has been pointed out by Mr. Justice Clark in his concurring opinion in *Baker v. Carr*, 369 U.S. 186 (1962) wherein he states:

> "A]though I find the Tennessee apportionment statute statute offends the Equal Protection Clause, I would not consider intervention by this Court into so delicate a field if there were any other relief available to the people of Tennessee. But the majority of the people of Tennessee have no 'practical opportunities for exerting their political weight at the polls' to correct the existing 'invidious discrimination.' Tennessee has no initiative and referendum. I have searched diligently for other 'practical opportunities' present under the law. I find none other than through the federal courts." (369 U.S. at 258-259)

Where such opportunity for the electorate to impose its will at the polls exists, where the electorate has in the past so used its opportunity and where such opportunity continues to be readily available, the Federal Courts should as a matter of judicial discretion decline to exercise their equitable powers.

B. There exists no need in the field of Colorado legislative apportionment for equitable intervention, because of the readily available remedy of initiative and referendum.

Without in any manner detracting from our position that the present apportionment of the Colorado legislature is consonant with the Equal Protection Clause of the Fourteenth Amendment, we here bring to the attention of the Court the liberal, inexpensive and frequently invoked provisions of the Colorado Constitution giving the electorate

complete and final control through the initiative and referendum over the state's constitution and its laws.

The basic initiative and referendum provisions are contained in Article V, Section 1 of the Colorado Constitution[35] which vests the ultimate legislative power of the state in the people. Section 1 provides in material part as to initiative:

> "The legislative power of the state shall be vested in the general assembly consisting of a senate and house of representatives, both to be elected by the people, but the people reserve to themselves the power to propose laws and amendments to the constitution and to enact or reject the same at the polls independent of the general assembly, and also reserve power at their own option to approve or reject at the polls any act, item, section or part of any act of the general assembly.
>
> "The first power hereby reserved by the people is the initiative, and at least eight per cent. of the legal voters shall be required to propose any measure by petition, and every such petition shall include the full text of the measure so proposed. Initiative petitions for state legislation and amendments to the constitution, shall be addressed to and filed with the secretary of state at least four months before the election at which they are to be voted upon . . . . All elections on measures referred to the people of the state shall be held at the biennial regular general election, and all such measures shall become the law or a part of the constitution, when approved by a majority of the votes cast thereon, and not otherwise, and shall take effect from and after the date of the official declaration of the vote thereon by proclamation of the governor, but not later than thirty days after the vote has been can-

[35]The full text of Section 1 is set forth at the end of this brief in the Colorado Constitutional Provisions Appendix.

vassed . . . . The whole number of votes cast for secretary of state at the regular general election last preceding the filing of any petition for the initiative or referendum shall be the basis on which the number of legal voters necessary to sign such petition shall be counted."

Article V, Section 1 is implemented by Chapter 70 of the Colorado Revised Statutes 1953, as amended. This chapter contains provision for publication of proposed laws and constitutional amendments in newspapers throughout the state. (Sec. 70-1-2, Colo. Rev. Stat. 1953) It also provides that no person may ". . . receive any money or thing of value in consideration of or as an inducement to the circulation of [an initiative] petition by him . . . ." (Sec. 70-1-6, Colo. Rev. Stat. 1953, as amended.)

From the foregoing, the following observations regarding the Colorado initiative are apparent:

a. The ultimate authority both for making laws and amending the state's constitution rests in the true sense with the Colorado electorate.

b. The signers of the initiative petitions need not come from any particular county, group or political party.

c. To place an initiated matter on the ballot requires a petition containing the signatures of only eight per cent of the total ". . . number of votes cast for secretary of state . . ." at the preceding general election. (In the 1962 general election 578,186[36] votes were so cast. Eight per cent thereof equals 46,255 signatures, or only 2.6% of the state's 1960 population).

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[36]**Abstract of Votes Cast, General Election 1962,** compiled by Colorado Secretary of State and published by The Dingerton Press, Denyer, Colorado (1962) p. 25.

d. A law or amendment to the Colorado Constitution may be adopted by the simple, statewide majority vote of those who cast votes as to the law or amendment involved. It does not require more than a simple majority, nor a majority of the qualified electors, nor even of those voting at the election; only, to repeat, a majority of those voting on the particular measure.

e. The initiative is readily available and is relatively inexpensive. The cost of pressing an initiated measure through to enactment will vary with the popular support which the measure has and with the number of volunteers who can be enlisted to work in its behalf. By statute, no one may be paid to circulate an initiative petition. (Sec. 70-1-6 Colo. Rev. Stat. 1953, as amended). Volunteers, therefore, must circulate the petitions and they can also provide legal advice, notarizations, printing, speakers and releases to the press and other publicity media. If the cause is good, as would be the case if an invidious discrimination existed, there would always be and always has been a wealth of such volunteers. Such a cause would also elicit adequate financial contributions for any other expenses not covered by voluntary services. Therefore, the principal item of expense in initiating an amendment merely is that of formal publication thereof. In the 1962 election, this amounted to only $2,250.60 for Amendment 7 (the Colorado plan) and $3,246.32 for Amendment 8 (the plan to apportion the senate on the basis of population).[37]

We have examined the constitutions of the fifty states and,

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[37]Source: Records of the Office of the Colorado Secretary of State.

with the exception of North Dakota,[38] find no other provisions for initiating constitutional amendments as liberal as those of Colorado.[39]

Should the Colorado electorate or any individual voters feel now or at some future time that unreasonable inequalities exist or have crept into the apportionment of the Colorado legislature by virtue of shifts of population or for any other reason, a ready solution for their grievance rests with the initiative provisions of the Colorado Constitution. Indeed, Appellants have the opportunity at the coming general election this fall to place their suggested apportionment (Appellants' brief, Appendix C) on the ballot, rather than attempt to place the burden of reapportionment upon this Court. Since they have suggested what they consider a happy solution, let them put it up to the people.

Since the Constitutional and statutory provisions above cited do not convey in a complete sense the true spirit of the initiative and referendum in Colorado, we set forth below a dramatic illustration of the frequency of their exercise at the polls by the voters of Colorado. It is a survey compiled by the Colorado Legislative Reference Office, State Capitol, Denver, Colorado, showing the number, the passage and the rejection of all initiated and referred constitutional amendments voted on by the people of Colorado since the inception of the initiative.

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[38]In North Dakota the initiative petitions for placing an amendment on the ballot need only be signed by 10,000 voters and an amendment passes on receiving a majority of the votes cast therefor. (N.D. Const. Art. 2, § 25)

[39]California (Calif. Const. Art. 4, §1) comes the closest, requiring petitions signed by voters equal in number to 8% of the votes cast for governor in the preceding election. Missouri (Mo. Const. Art. 3, §50) requires petitions bearing signatures equal in number to 8% of the legal voters in each of ⅔rds of the Congressional Districts in the state. Michigan (Mich. Const. Art. 17, § 2) requires initiative petitions to bear the signatures of 10% of the number of voters at the last general election. All of the other states which provide for initiated amendments impose more stringent requirements. These states (the only other ones providing for such initiated constitutional amendments) and their respective constitutional provisions are: Arkansas (Ark. Const. Amdt. No. 7), Arizona (Ariz. Const. Art. 4, Part 1, § 1), Massachusetts (Mass. Const. Art. 48), Nebraska (Neb. Const. Art. 3, § 2), Ohio (Ohio Const. Art. 2, § 1a), Oklahoma (Okla. Const. Art. 5, § 2) and Oregon (Ore. Const. Art. 4, § 1).

COLORADO INITIATIVE AND REFERENDUM

1912 to 1962, Inclusive

Year	Total Initiated and Referred	Constitutional Amendments Voted Upon					
		Initiated by People			Referred by Assembly		
		Number	Adopted	Defeated	Number	Adopted	Defeated
1912	14	10	3	7	4	0	4
1914	8	5	1	4	3	1	2
1916	2	2	0	2	0	0	0
1918	3	1	1	0	2	2	0
1920	5	2	1	1	3	1	2
1922	7	3	1	2	4	1	3
1924	3	1	0	1	2	0	2
1926	5	1	0	1	4	0	4
1928	5	2	0	2	3	1	2
1930	1	1	0	1	0	0	0
1932	5	4	1	3	1	0	1
1934	6	3	1	2	3	0	3
1936	7	4	2	2	3	2	1
1938	2	2	0	2	0	0	0
1940	4	4	0	4	0	0	0
1942	1	0	0	0	1	0	1
1944	3	2	1	1	1	1	0
1946	2	0	0	0	2	1	1
1948	3	2	0	2	1	1	0
1950	3	1	0	1	2	2	0
1952	5	2	0	2	3	1	2
1954	7	1	1	0	6	1	5
1956	5	2	1	1	3	2	1
1958	5	2	1	1	3	0	3
1960	5	3	0	3	2	0	2
1962	8	2	1	1	6	4	2
	124	62	16	46	62	21	41

The fact of greatest significance in the table is, of course, the frequency of the exercise of the initiative. However, note should also be taken of the large number of initiated amendments which have not passed. As testified by former Governor Johnson (App. p. 201) there is more often than not a negative vote as to amendments on the

ballot. An amendment which the voters do not understand or which does not have popular support is unlikely to pass.[40] Such was not the case with the Colorado plan (Amendment 7) and such will not be the case hereafter for any measure which the people of Colorado truly support.

This case, therefore, presents none of the factors which have heretofore caused this Court to deem equitable action necessary. As we demonstrated in the first part of our brief, no invidious inequalities exist in the present apportionment of the legislature. Assuming, as Appellants maintain, that population shifts in the future will create gross inequalities, the electorate by its own initiative and by simple majority vote can correct such inequalities. The incessant references throughout Appellants' brief to the apportionment of the Colorado legislature being "frozen in perpetuity"[41] are absolutely contrary to fact. The apportionment of the legislature, be it through law or constitutional amendment is not, never has been and as long as the initiative is maintained never will be frozen in Colorado.

As noted above, this mixed area of law and politics is one to be approached with caution. Recognizing this Court's holding in *Baker v. Carr, supra*, that the controversy is "justiciable," there exists no need for the Court to exercise its discretionary equitable powers. The initiative gives the people of Colorado ample means for redress of any apportionment grievance which may arise. They may have that redress on a continuing basis at every biennial general election without any need to turn to the courts. This case presents no need for judicial intervention. It is submitted, therefore, that this Court should withhold the unnecessary exercise of its equitable power.

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[40]It might be here noted that another effort was made prior to 1962 to apportion the Colorado Senate on a strict population basis. In 1956 an initiated amendment so to apportion the Senate was defeated by a vote of 349,195 to 158,204. It lost in every county except Denver (App. p. 199).

[41]Appellants' brief, pp. 3, 11, 24, 25, 26, 31, 32, 42, 50 and 53.

CONCLUSION

For the foregoing reasons the appeal should be dismissed or, in the alternative, the judgment below should be affirmed.

Respectfully submitted,

RICHARD S. KITCHEN, SR.
First National Bank Bldg.
Denver, Colorado 80202

CHARLES S. VIGIL
E & C Building
Denver, Colorado

STEPHEN H. HART
JAMES LAWRENCE WHITE
WILLIAM E. MURANE
WILLIAM J. CARNEY, JR.
500 Equitable Building
Denver, Colorado 80202

Attorneys for Appellees

APPENDIX

COLORADO CONSTITUTIONAL PROVISIONS

CONSTITUTION OF COLORADO

ARTICLE V

Legislative Department

Section 1. **General assembly — initiative and referendum.**—The legislative power of the state shall be vested in the general assembly consisting of a senate and house of representatives, both to be elected by the people, but the people reserve to themselves the power to propose laws and amendments to the constitution and to enact or reject the same at the polls independent of the general assembly, and also reserve power at their own option to approve or reject at the polls any act, item, section or part of any act of the general assembly.

The first power hereby reserved by the people is the initiative, and at least eight per cent. of the legal voters shall be required to propose any measure by petition, and every such petition shall include the full text of the measure so proposed. Initiative petitions for state legislation and amendments to the constitution, shall be addressed to and filed with the secretary of state at least four months before the election at which they are to be voted upon.

The second power hereby reserved is the referendum, and it may be ordered, except as to laws necessary for the immediate preservation of the public peace, health or safety, and appropriations for the support and maintenance of the department of state and state institutions, against any act, section or part of any act of the general assembly, either by a petition signed by five per cent. of the legal voters or by the general assembly. Referendum petitions shall be addressed to and filed with the secretary of state not more than ninety days after the final adjourn-

ment of the session of the general assembly, that passed the bill on which the referendum is demanded. The filing of a referendum petition against any item, section or part of any act, shall not delay the remainder of the act from becoming operative. The veto power of the governor shall not extend to measures initiated by, or referred to the people. All elections on measures referred to the people of the state shall be held at the biennial regular general election, and all such measures shall become the law or a part of the constitution, when approved by a majority of the votes cast thereon, and not otherwise, and shall take effect from and after the date of the official declaration of the vote thereon by proclamation of the governor, but not later than thirty days after the vote has been canvassed. This section shall not be construed to deprive the general assembly of the right to enact any measure. The whole number of votes cast for secretary of state at the regular general election last preceding the filing of any petition for the initiative or referendum shall be the basis on which the number of legal voters necessary to sign such petition shall be counted.

The secretary of state shall submit all measures initiated by or referred to the people for adoption or rejection at the polls, in compliance herewith. The petition shall consist of sheets having such general form printed or written at the top thereof as shall be designated or prescribed by the secretary of state; such petition shall be signed by qualified electors in their own proper persons only, to which shall be attached the residence address of such person and the date of signing the same. To each of such petitions, which may consist of one or more sheets, shall be attached an affidavit of some qualified elector, that each signature thereon is the signature of the person whose name it purports to be, and that to the best of the knowledge and belief of the affiant, each of the persons signing said petition was at the time of signing, a qualified elector. Such petition so verified shall be prima facie evidence that the

signatures thereon are genuine and true and that the persons signing the same are qualified electors. The text of all measures to be submitted shall be published as constitutional amendments are published, and in submitting the same and in all matters pertaining to the form of all petitions the secretary of state and all other officers shall be guided by the general laws, and the act submitting this amendment, until legislation shall be especially provided therefor.

The style of all laws adopted by the people through the initiative shall be, "Be it Enacted by the People of the State of Colorado."

The initiative and referendum powers reserved to the people by this section are hereby further reserved to the legal voters of every city, town and municipality as to all local, special and municipal legislation of every character in or for their respective municipalities. The manner of exercising said powers shall be prescribed by general laws, except that cities, towns and municipalities may provide for the manner of exercising the initiative and referendum powers as to their municipal legislation. Not more than ten per cent. of the legal voters may be required to order the referendum, nor more than fifteen per cent. to propose any measure by the initiative in any city, town or municipality.

This section of the constitution shall be in all respects self-executing.

As amended November 8, 1910.